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National Fabco Manufacturing, Inc. and Sheet Metal Workers' International Association, AFL-CIO, Local Union No. 202. Case 14-CA-29107

March 17, 2008

DECISION AND ORDER

BY MEMBERS LIEBMAN AND SCHAMBER

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge and an amended charge filed by the Union on October 9 and November 29, 2007, respectively, the General Counsel issued the complaint on November 29, 2007, against National Fabco Manufacturing, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On January 23, 2008, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on January 30, 2008, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment¹

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that the answer must be received by the Regional Office on or before December 13, 2007, and that if no answer was filed, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated December 17, 2007, and through a telephone conversation that same day, notified the Respondent that unless an answer was received by close of business on December 24, 2007, a motion for default judgment would be filed.

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Missouri corporation with an office and place of business in St. Louis, Missouri, has been engaged in the manufacture of kitchen equipment.

During the 12-month period ending September 30, 2007, the Respondent, in conducting its business operations described above, purchased and received at its St. Louis, Missouri facility goods valued in excess of \$50,000 directly from points outside the State of Missouri, and during that same period, purchased and received at its St. Louis, Missouri facility goods valued in excess of \$50,000 from other enterprises located within the State of Missouri, each of which other enterprises had received these goods directly from points outside the State of Missouri.

During 12-month period ending September 30, 2007, the Respondent, in conducting its business operations described above, sold and shipped from its St. Louis, Missouri facility goods valued in excess of \$50,000 directly to points outside the State of Missouri, and during that same period, sold and shipped from its St. Louis, Missouri facility goods valued in excess of \$50,000 to enterprises within the State of Missouri, each of which enterprises is directly engaged in interstate commerce.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Sheet Metal Workers' International Association, AFL-CIO, Local Union No. 202, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act.

Ed Page -	-	President and Co-Owner
Kevin Stubbs -	-	Manager and Co-Owner

The following employees of Respondent, the unit, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All sheet metal workers including pipe machine operators, 10 & 12 foot shears operators, press brake operators, welders, assemblers, machine helpers and material handlers, metal polishers, grinders, layout assemblers, maintenance mechanics, refrigeration man and journeymen sheet metal layout mechanics employed by Respondent, excluding office clerical and professional employees, guards, and supervisors as defined in the Act.

Since on or about August 30, 2005, the Union has been the designated exclusive collective-bargaining representative of the unit, and since then the Union has been recognized as the representative by Respondent. This recognition is embodied by the Respondent's adoption of its predecessor's collective-bargaining agreement which was effective from October 1, 2003 to September 30, 2007 (the 2003–2007 agreement).

At all material times since about August 30, 2005, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since about June 1, 2007, the Respondent has failed to continue in effect all the terms and conditions of the 2003–2007 agreement by failing to make health and wealth and pension fund contributions on behalf of unit employees.

Since about August 1, 2007, the Respondent has failed to remit to the Union the dues required by Article 2 of the 2003–2007 agreement that the Respondent has withheld from the paychecks of unit employees.

Since about September 9, 2007, the Respondent has failed to continue in effect all the terms and conditions of the 2003–2007 agreement by failing and refusing to pay employees wages and accrued vacation pay.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purpose of collective bargaining. The Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

About September 14, 2007, the Respondent ceased operations and laid off all employees in the unit. This subject relates to wages, hours, and other terms and conditions of employment of the unit and is a mandatory subject for the purpose of collective bargaining.

Since about September 14, 2007, the Respondent has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of the unit over the effects on the unit of its decision to cease operations and the resulting layoffs.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.²

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy the Respondent's unlawful failure and refusal to bargain with the Union about the effects of the Respondent's decision to cease operations at its St. Louis, Missouri facility, we shall order the Respondent to bargain with the Union, on request, about the effects of its decision. As a result of the Respondent's unlawful conduct, however, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany our bargaining order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to re-create in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).³

Thus, the Respondent shall pay its unit employees backpay at the rate of their normal wages when last in the

² In light of our finding that the Respondent unlawfully failed to bargain with the Union about the effects of its decision to close its facility, we find it unnecessary to pass on the complaint's further allegation that about September 20 and 21, 2007, after the Respondent ceased operations and laid off all employees in the unit, the Respondent additionally violated Sec. 8(a)(5) and (1) by failing to respond to telephone messages left by the Union on the voicemail of Respondent's manager and co-owner Kevin Stubbs.

³ See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990).

Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of its decision to cease operations of its facility on the unit employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent ceased operations of its St. Louis, Missouri facility to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the unit employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁴

Further, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to continue in effect all of the terms and conditions of the 2003–2007 agreement by failing to make health and welfare and pension fund contributions on behalf of the unit employees since June 1, 2007, we shall order the Respondent to make all such delinquent health and welfare and pension fund contributions that have not been made since June 1, 2007, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).⁵ We shall also order the Respondent to reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2

(1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

In addition, having found that the Respondent violated Section 8(a)(5) and (1) by failing since August 1, 2007, to remit to the Union the dues required by Article 2 of the 2003–2007 agreement that the Respondent withheld from the paychecks of employees, we shall order the Respondent to forward such withheld dues to the Union as required by the 2003–2007 agreement, with interest, as prescribed in *New Horizons for the Retarded*, supra.

Also, having found that the Respondent violated Section 8(a)(5) and (1) by failing to continue in effect all of the terms and conditions of the 2003–2007 agreement by failing to pay unit employees wages and accrued vacation pay since September 9, 2007, we shall order the Respondent to make the unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

Finally, in view of the fact that the Respondent has ceased operations at its St. Louis, Missouri facility, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of the unit employees who were employed by the Respondent since June 1, 2007, in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, National Fabco Manufacturing, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with Sheet Metal Workers' International Association, AFL–CIO, Local Union No. 202, as the exclusive collective-bargaining representative of the employees in the unit set forth below, over the effects of the Respondent's decision to cease operations at its St. Louis, Missouri facility:

All sheet metal workers including pipe machine operators, 10 & 12 foot shears operators, press brake operators, welders, assemblers, machine helpers and material handlers, metal polishers, grinders, layout assemblers, maintenance mechanics, refrigeration man and journeymen sheet metal layout mechanics employed by Respondent, excluding office clerical and professional

⁴ In the complaint, the General Counsel "seeks compound interest computed on a quarterly basis for any backpay awarded." Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Rogers Corp.*, 344 NLRB 504 (2005).

⁵ To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

employees, guards, and supervisors as defined in the Act.

(b) Failing to continue in effect all the terms and conditions of its 2003–2007 agreement with the Union by failing to make health and welfare and pension fund contributions on behalf of the employees.

(c) Failing to remit to the Union the dues required by Article 2 of the 2003–2007 agreement that the Respondent withheld from the paychecks of employees since August 1, 2007.

(d) Failing to continue in effect all the terms and conditions of its 2003–2007 agreement with the Union by failing to pay employees wages and accrued vacation pay.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith with the Union concerning the effects of the Respondent's decision to cease operations at its St. Louis, Missouri facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

(b) Pay the unit employees their normal wages for the period set forth in the remedy section of this decision.

(c) Make all delinquent health and welfare and pension fund contributions on behalf of employees, with interest, that have not been made since June 1, 2007, in the manner set forth in the remedy section of this decision.

(d) Make whole the unit employees for any expenses ensuing from the Respondent's failure to make the contractually-required health and welfare and pension fund contributions, with interest, as set forth in the remedy section of this decision.

(e) Remit to the Union all dues required by Article 2 of the 2003–2007 agreement that have not been remitted since August 1, 2007, that the Respondent withheld from the paychecks of employees in the unit, with interest.

(f) Make whole the unit employees for any loss of earnings and other benefits resulting from the Respondent's failure to pay employees wages and accrued vacation pay since September 9, 2007, with interest, as set forth in the remedy section of this decision.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form,

necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"⁶ to the Union and to all unit employees who were employed by the Respondent at any time since June 1, 2007.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. March 17, 2008

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

MAILED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Sheet Metal Workers' International Association, AFL–CIO, Local Union No. 202, as the exclusive collective-bargaining representative of the employees in the unit below, over the effects of our deci-

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed By Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sion to cease operations at our St. Louis, Missouri facility and layoff the employees in the unit. The unit is:

All sheet metal workers including pipe machine operators, 10 & 12 foot shears operators, press brake operators, welders, assemblers, machine helpers and material handlers, metal polishers, grinders, layout assemblers, maintenance mechanics, refrigeration man and journeymen sheet metal layout mechanics employed by us, excluding office clerical and professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT fail to continue in effect all the terms and conditions of the October 1, 2003 to September 30, 2007 collective-bargaining agreement with the Union, including failing to make health and welfare and pension fund contributions on behalf of the employees.

WE WILL NOT fail to remit to the Union the dues required by Article 2 of the collective-bargaining agreement that were withheld from the paychecks of employees, since August 1, 2007.

WE WILL NOT fail to continue in effect all the terms and conditions of the October 1, 2003 to September 30, 2007 collective-bargaining agreement including failing and refusing to pay employees wages and accrued vacation pay.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union concerning the effects of our decision to cease operations at our St. Louis, Missouri facility and the resulting layoffs of the employees in the unit, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay the unit employees their normal wages for the period set forth in the Decision and Order of the National Labor Relations Board, with interest.

WE WILL make all delinquent health and welfare and pension fund contributions on behalf of employees, with interest, that have not been made since June 1, 2007.

WE WILL make whole the unit employees for any expenses ensuing from our failure to make the contractually-required health and welfare and pension fund contributions, with interest.

WE WILL remit to the Union all dues required by Article 2 of the collective-bargaining agreement that have not been remitted since August 1, 2007, and that were withheld from the paychecks of employees in the unit, with interest.

WE WILL make whole the unit employees for any loss of earnings and other benefits resulting from our failure to pay employees wages and accrued vacation pay since September 9, 2007, with interest.

NATIONAL FABCO MANUFACTURING, INC.